(1) Supreme Court, U.S.
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In The

Supreme Court of the United States

Jon Zavalidroga

v.

Parties In United States

On Petition For Writ Of Certiorari To
The United States Court of Appeals For
The Ninth Circuit

Prepared by:

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THE QUESTION FOR REVIEW

Petitioner Jon Zavalidroga was denied coram nobis relief for a criminal-conviction reversal because the out-of-custody defendant had never filed a 28 U.S.C. 2255 motion before the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA).

The Ninth Circuit will not acknowledge the full scope of this self-same Antiterrorism Act of 1996, Title I - Habeas Corpus Reform, Section 105 Amendments, Rule (4). Other federal circuits are conceding that the AEDPA one-year statute of limitations is intended by Congress to be equitably tolled in the specific situation when a diligent defendant discovers that his own appointed appellate attorney's purposeful fraud has deliberately deceived the defendant into believing that a timely 28 U.S.C. 2255 motion had been filed.

The Ninth Circuit is in the most direct conflict with recent harbinger equitable-tolling decisions which are being made in identical circumstances by other federal circuits; see Wims v. United States, 225 F.3d 186 (2nd Cir. 2000).

PARTIES TO PROCEEDING

1) The federal prosecutor in District Court Case #CR-96-0146 MMC:

Karen Beausey
U.S. Attorney's Office
450 Golden Gate Avenue
P.O. Box 36055
San Francisco, California 94102

2) The district court in which trial docket #CR-96-0146 was held:

Honorable Maxine Chesney
United States District Court
for the Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

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STATEMENT OF JURISDICTION

The District Court for the Northern District of California which denied Zavalidroga's coram nobis petition on July 9, 2001 had jurisdiction under 18 U.S.C. 3231.

The Ninth Circuit Court of Appeals thereafter had jurisdiction under 28 U.S.C. 1291. The Ninth Circuit affirmed district court's denial of coram nobis on December 9, 2002. The Ninth Circuit denied a rehearing of its own affirmation on July 8, 2003.

The Ninth Circuit denial date of Zavalidroga's rehearing petition, on July 8, 2003, began the 90-day period for filing a petition for certiorari under Supreme Court Rule 13 (1). The jurisdiction of the United States Supreme Court is based on 28 U.S.C. 1254.

STATEMENT OF STATUTES AND CONSTITUTIONAL PROVISIONS

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) - Title I - Habeas Corpus Reform, Section 105 Amendments, added a statute of limitations to 28 U.S.C 2255. The provision states in pertinent part:

A one-year period of limitations shall apply to a motion under this section. The limitation period shall run from the latest of --

1) the date on which the judgment of conviction becomes final;

2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(end of statute)

STATEMENT OF THE CASE

On July 16-18, 1996, Defendant Jon Zavalidroga was on trial in federal court for the Northern District of California (CR 29, 30, 31).

The trial verdict (CR 32) found Zavalidroga not guilty of Count One, mailing a threatening communication in violation of 18 U.S.C. 876; and guilty of Count Two, leaving a threatening voice message on a telephone-answering machine in violation of 18 U.S.C. 875.

At sentencing (CR 48), Zavalidroga handed to the court his own written letter (CR 47) in which Zavalidroga asserted that the prosecutor had underhandedly altered the sound on the voice-message trial evidence. Defendant Zavalidroga further explained during subsequent sentencing minutes (CR 51) that his grossly ineffective public defender had repeatedly refused his demands during the trial to bring up the issue of tampered trial evidence.

Prosecutor Karen Beausey made vehement oral declarations (CR 51) and provided her own written statement (CR 50) that the trial evidence had not been altered.

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footnote: "CR" refers to the Clerk's Record on the trial-court docket sheet.

The trial court (CR 51) stated that it was not going to tolerate any enhancement or manipulation to the voice-recorded evidence. Defendant Zavalidroga received oral verification from the district court (CR 51, 63, 66, 70) that a special appellate attorney, George Boisseau, would be appointed specifically so that Zavalidroga could have his evidence-tampering appeal.

Instantaneously with Appellate Attorney Boiseau's appointment, Zavalidroga's entire appeal process became a complete fraud in which the Appellate Attorney conspired to deliberately lose his own case as destructively irreversible as possible by making certain that the issue of manipulated trial evidence would never reach any appellate court.

Approximately 20 months after the Ninth Circuit had affirmed (CR 82) Zavalidroga's conviction as to Attorney Boisseau's fraudulent direct appeal #97-10290, Zavalidroga pro se wrote his letter of injustice to the district court (CR 89). Zavalidroga included an attorney-client letter in which Attorney Boisseau had explained a (completely phony) agreement in which the prosecutor had supplied a copy of the trial evidence with the stipulation that Attorney Boisseau's own chosen expert (who was in reality non-existent) could examine the evidence for manipulation.

As per a subsequent 28 U.S.C. 2255 motion, regardless of the issues which hypothetically either could or could not have been raised by any entity acting in Zavalidroga's behalf, there are no doubts whatsoever that Attorney Boisseau had additionally and fraudulently convinced Zavalidroga that a 28 U.S.C. 2255 motion actually

had been filed in Zavalidroga's behalf (in addition to numerous client-attorney telephone calls, (CR 89) contains client-attorney letters via which Zavalidroga spent 1 1/2 years monitoring the progress of Attorney Boisseau's (non-existent) Section 2255 motion.

The out-of-custody Zavalidroga pro se filed a timely coram nobis petition with the district court (Appendix C). There has never been, under coram nobis provisions, a time lapse of more than two years between any two court actions in Zavalidroga's case.

On December 9, 2002, Ninth Circuit Appeal #01-10432 (Appendix A) affirmed the denial of coram nobis with the explanation that Zavalidroga had not previously applied for relief under 28 U.S.C. 2255 within one year of the date when his conviction became final as required by AEDPA statute of limitations.

On July 8, 2003, the Ninth Circuit (Appendix B), without commentary, denied the Rehearing Petition with the added stipulation that no further appellant submissions would be accepted.

This timely Petition for a Writ of Certiorari to the Supreme Court followed the Ninth Circuit denial of a rehearing.

LEGAL ARGUMENT

The on-going lower-courts' original failures, beginning firstly with the district court's original decision (Appendix E, filed June 1, 2000), and consistently continuing right up to the present moment of Zavalidroga's second pro se Appeal #01-10432 (see Appendix A, Ninth Circuit's footnote at 2), has been a continuing dual failure of both these lower courts to recognize that because of the equitable-tolling standard in Wims v. United States, 225 F.3d 186 (2nd Cir. 2000), Zavalidroga was not already time-barred from filing a Section 2255 motion when he first contacted the district court about his appellate attorney's fraud.

Zavalidroga's contention to the Supreme Court is that his federal-circuit appeals will just keep going around and around in a vicious circle until the lower courts eventually acknowledge the judicial correctness of equitable tolling as construed by Wims, supra. The district court Order Denying Coram Nobis (see Appendix C), is incorrectly asserting that Zavalidroga pro se has somehow already raised his claims in a previously time-barred motion. Zavalidroga has been contending that it is not possible to have raised a claim in any previous motion which the district court would have firstly and incorrectly determined as being time-barred. There exists a dichtomy between an "application" and a "claim"; Artuz, Superintendent, Green Haven Correctional Facility v. Bennett, 531 U.S. 4, at 4 (2000).

Since the advent of AEDPA, a sufficient number of years has passed for most of the federal circuits, although quite reluctantly in some of these circuits; and also for various Supreme Court cases to gradually acknowledge that Congress intended for AEDPA to be equitably tolled; Williams v. Taylor, 529 U.S. 420, at 436 (2000).

However, AEDPA is still relatively new enough so that the different circuits are still not in uniform agreement as to the case-specific circumstances under which each circuit will individually acknowledge equitable tolling of AEDPA. These newly decided cases as to the case-specific circumstances which justify equitable tolling of AEDPA are such a recent harbinger of equitable-tolling principles that the Ninth Circuit has not yet conceded as to the correctness of the other circuits' decisions.

There are no doubts that Attorney Boisseau has purposefully deceived Zavalidroga as to which issues had been raised on direct appeal ((CR 89) contains an attorney-to client explanatory letter). Zavalidroga contends that the published-case direct-appeal scenario which is most similar to Zavalidroga's own case is Aron v. United States, 291 F.3d 708 (11th Cir. 2002).

There is additionally no doubt whatsoever that Appellate Attorney Boisseau had fraudulently convinced Zavalidroga that a 28 U.S.C. 2255 motion had been filed in Zavalidroga's behalf. The Ninth Circuit Memorandum #01-10432 (Appendix A), begins its final-paragraph conclusion with the statement, "To the extent Zavalidroga alleges that he

did not file a timely petition because he relied on his appellate attorney's promise to file a 2255 motion on his behalf, this claim fails.". This Ninth Circuit conclusion stands in the starkest contrast possible to the construal of equitable tolling in Wims v. United States, 225 F.3d 186 (2nd Cir. 2000).

The judicial correctness of equitable tolling in Wims, supra, has already been acknowledged and cited by other courts, including the somewhat-related decision in Tocci v. United States, 178 F.SUPP. 2d 176, cited at 179 (N.D.N.Y. 2001).

As per the judicial correctness of interpreting the precisely correct meaning of AEDPA's language "from the latest of...", Zavalidroga brings attention to the explanatory context of Baskin v. United States, 998 F.SUPP. 188 (D.Conn. 1998). Baskin, supra, quoted at 190: "The statute of limitations runs (emphasis added) "from the latest of - (1) the date on which the judgment of conviction becomes final; ...(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence"."

The Ninth Circuit Memorandum #01-10432 (Appendix A) particular legal construction in Zavalidroga's situation additionally seems to be in awkward conflict with the recent AEDPA-contemporary Supreme Court decision which was remanded to the Ninth Circuit in Roe, Warden v. Flores-Ortega, 528 U.S. 470 (2000).

It would be fallacious for any party of record to argue that 28 U.S.C. 2255 would have tolled during the interim between the time of Zavalidroga's discovery of his attorney's fraud and the present moment. Section 28 U.S.C. 2255 contains a jurisdictional "in custody requirement" which would have been nullified with the conclusion of Zavalidroga's probational custody on June 18, 2000. The benchmark out-of-custody 28 U.S.C. 1651 conviction-reversal case is United States v. Morgan, 346 U.S. 502 (1954).

CONCLUSION

Zavalidroga contends that the Ninth Circuit will not acknowledge other circuits' correct construals of Wims v. United States, 225 F3d 186 (2nd Cir. 2000), as being one of the precise types of situations for which equitable-tolling principles have been consciously authored into AEDPA. The Ninth Circuit's Memorandum #01-10432 should therefore be reversed. For the Supreme Court's "Considerations Governing Review on Certiorari", see Supreme Court Rule 10 (a).

Respectfully submitted,

Jon Zavalidroga

Jon Zavalidroga, pro se

Filed December 9, 2002

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States,
Plaintiff-Appellee,

v.

Jon Zavalidroga,
Defendant-Appellant.

No. 01-10432
D.C. No.
CR-96-00146-MMS

MEMORANDUM*

Appeal from the United States District Court for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted December 2, 2002 **

Before: GOODWIN, TROTT, and GRABER,
Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed.R App.P. 34(a) (2).

Former federal prisoner Jon Zavalidroga appeals pro se the district court's denial of his petition for writ of coram nobis, challenging his conviction for transmitting a threatening communication in interstate commerce in violation of 18 U.S.C. 875(c). We have jurisdiction pursuant to 28 U.S.C. 1291. Reviewing de novo, see United States v. Walgren, 885 F2d 1417, 1420 (9th Cir. 1989), we affirm.

Zavalidroga contends that the district court erred in denying his writ for coram nobis as time-barred under 28 U.S.C. 2255, because he has never attacked his conviction pursuant to a 2255 motion in the district court.

In this case, Zavalidroga raises the same claims he previously raised in a time-barred writ of mandamus while he was in federal custody.1 Because Zavalidroga may not now circumvent 2255's statute of limitations by filing a writ of coram nobis, the district court properly denied the instant writ. Matus-Leva v. United States, 287 F.3d 758, 761 (9th Cir.) (stating that a "petitioner may not resort to coram nobis merely because he has failed to meet the AEDPA's gatekeeping requirements."), cert. denied, 2002 WL 31308857 (November 12, 2002).

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1 United States v. Zavalidroga, No. 00-10324, 2 Fed. Appx. 787, 2001 WL 68337, at *1 (9th Cir. 2001) (memorandum) (deciding that it would be futile to construe Zavalidroga's petitions as motions under 2255 because the statute of limitations had expired).

To the extent Zavalidroga alleges that he did not file a timely petition because he relied on his appellate counsel's promise to file a 2255 motion on his behalf, this claim fails. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (recognizing that a prisoner does not have a constitutional right to counsel on collateral review); see also Wainwright v. Torna, 455 U.S. 586, 587-588 (1982) (per curiam) (deciding that a prisoner could not be deprived of effective assistance of counsel during a proceeding where there is no constitutional right to counsel).

AFFIRMED.

Filed July 8, 2003

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States,
Plaintiff-Appellee,

v.

Jon Zavalidroga,
Defendant-Appellant.

No. 01-10432
D.C. No.
CR-96-00146-MMS
Northern California
(San Francisco)

ORDER

Before: GOODWIN, TROTT, and GRABER,
Circuit Judges

Appellant's petition for panel rehearing is denied. See Fed.R.App.P.40. No further filings shall be accepted in this closed appeal.

Filed July 9, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,

v. No. CR-96-0146MMC

JON ZAVALIDROGA,
Defendant

/

ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF CORAM NOBIS

(Docket #106)

The Court is in receipt of defendant Jon Zavalidroga's petition, filed April 20, 2001, entitled Petition for District Court to Grant Defendant Zavalidroga's Application to the Ninth Circuit Court of Appeals for a Writ of Coram Nobis and a New Trial. In the instant petition, defendant contends that his appellate attorney provided ineffective assistance of counsel by not raising on direct appeal the issue of whether "tampered tape-recorded trial evidence" was offered against defendant at his criminal trial. (See Def's Petition at 3.)

Defendant further contends that he cannot raise this issue in a motion to vacate or set aside his sentence pursuant to 28 U.S.C. 2255 as he is no longer in custody. 1

"[A] petitioner must show the following to qualify for coram nobis relief: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from he conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987).

Defendant cannot establish the second element set forth in Hirabayashi as defendant has already attacked his conviction by raising the very claim presented in the present petition. Specifically, in his petition for a writ of mandamus filed May 24, 2000, defendant contended that his appellate attorney did not include the "physical taped-evidence tampering [issue] in his submitted appeal," (see Mandamus petition, filed May 24, 2000, at 4), and that "[c]ounsel's blatant disregard for setting out the claims of the defendant in the appeal constituted ineffective assistance of counsel." (Id.) After this Court denied defendant's petition for a writ of

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1 On June 19, 1997, following defendant's conviction for violation of 18 U.S.C. 875(c) defendant was sentenced to a ninety-day prison term and a three-year term of probation. (See Judgment, filed June 19, 1997.) Defendant's probationary term has now expired.

mandamus, (see Order Denying Writ of Mandamus, filed June 1, 2000), the Ninth Circuit affirmed, concluding that it would be futile to construe defendant's May 24, 2000 petition as a motion to vacate, set aside or correct his sentence pursuant to 2255 because any such action would be untimely. (See Memorandum, filed January 24, 2001.)

The Ninth Circuit has concluded that the claim raised in the present petition was time-barred when brought in May 2000; defendant may not circumvent that ruling by merely re-alleging the same claim in a petition for a writ of coram nobis. Accordingly, defendant's petition for a writ of coram nobis is hereby DENIED.

This order resolves docket #106.

IT IS SO ORDERED.

Dated: July 9, 2001

"s/ Maxine Chesney"
United States District
Judge

Filed January 24, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, No. 00-10324

Plaintiff-Appellee, D.C. No. CR-96-00146-MMC

v. MEMORANDUM 1

JON ZAVALIDROGA,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Submitted January 8, 2001 2

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1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

2. The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Before: BEEZER, O'SCANNLAIN and KLEINFELD, Circuit Judges.

Jon Zavalidroga ("Zavalidroga") appeals pro se from the orders of the district court denying his petition for a writ of mandamus to compel the district court to reopen his federal criminal conviction, and his petition to provide a review of his appeal from the judgment of conviction. In 1997 Zavalidroga was convicted of transmitting a threatening communication in interstate commerce under 28 U.S.C. 875(c). His conviction was affirmed by this court on July 7, 1998. Zavalidroga argues that the district court erred in refusing to conduct an inquiry into the possibility of judicial fraud in the handling and presentation of a tape recording of a telephone call. We affirm because we conclude that the district court did not abuse its discretion in denying the petitions.

A peremptory writ of mandamus is traditionally used to compel a district court to exercise its authority. Will v United States, 389 U.S. 90, 95 (1967). "The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute." Pennsylvania Bureau of Correction v. U.S. Marshals Service, 474 U.S. 34, 43 (1985). A petition filed pursuant to 28 U.S.C. 2255 "provides the exclusive procedural mechanism by which a federal prisoner may test the legality of his detention." Lorensten v. Hood, 223 F.3d 950, 953 (9th Cir. 2000)(citing United States v. Pirro, 104 F.3d 297, 299 (9th Cir. 1997)).

We also note that it would have been futile for the district court to construe Zavalidroga's petitions as motions to vacate, set aside or correct his sentence because he did not comply with the filing procedures mandated by 28 U.S.C. 2255. Zavalidroga's one-year time period for filing such a motion expired on July 7, 1998, long before he filed his

mandamus petitions in April and May of 2000. 28 U.S.C. 2255(1); United States v. Garcia, 210 F.3d 1058, 1058 (9th Cir. 2000).

AFFIRMED.

Filed June 1, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

UNITED STATES OF AMERICA, No. CR-96-0146-MMC

Plaintiff, ORDER DENYING WRIT OF MANDAMUS

v.

JON ZAVALIDROGA,

Defendant
_____/

On May 24, 2000, defendant Jon Zavalidroga filed a "Mandamus to Compel the Court to Provide a Review of the Appeal for Case #CR-96-0146 MMC." The Court construes this as a petition for writ of mandamus. In said petition, defendant contends that he has "continuously maintained to the courts and to all parties of record that the prosecution achieved [his] conviction entirely pursuant to high-technology professional alterations made surreptitiously to the sound on the tape-recorded trial evidence." Pet. at 1.

On April 24, 2000, defendant filed a similar paper entitled: "Mandamus to Compel the District Court to Reopen Case." Defendant's April 24, 2000 petition was denied by the Court by order dated May 3, 2000. The Court explained in its May 3, 2000 order:

A writ of mandamus is a drastic remedy to be used only in extraordinary circumstances. See Kerr v. United States Dist. Court, 426 U.S. 394 (1976). Mandamus relief is only available to compel an officer of the United States to perform a duty if: (1) the party's claim is clear and certain; (2) the duty is ministerial and so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available. See Fallini v. Hodel, 783 F.2d 1343, 1345 (9th Cir. 1986) (citations omitted). The party seeking mandamus carries the heavy burden of showing all three criteria are met. See Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980).

Here, as with defendant's previous petition, defendant has failed to make the required showings. Accordingly, the Court hereby DENIES the petition for a writ of mandamus.1

IT IS SO ORDERED.

Dated: June 1, 2000

"s/ Maxine M. Chesney"
United States District
Judge

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1 The Court notes that a defendant seeking to collaterally challenge a conviction may file a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255. Section 2255 motions, however, are subject to a one-year statute of limitations period and it appears that more than one year has elapsed since defendant's judgment became final.